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**REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL**

ITEM NUMBER 203 ON CITY COUNCIL DOCKET OF JULY 29, 2002

INTRODUCTION

The City Manager is bringing forward three resolutions and three ordinances relating to the City's public contracting under item number 203 on the Council's docket of July 29, 2002. The Manager recommends that the City Council adopt the three resolutions and introduce the three ordinances at that meeting. If adopted on July 29, the three resolutions will become effective immediately. If introduced on July 29, the three ordinances will return to Council for adoption in September 2002. Subject to an exercise of the referendum, they will become effective thirty days thereafter.

This report describes the major features of these three ordinances and three resolutions. It also provides a brief analysis of potential legal issues raised by these proposed actions. For the Council's ease in cross-referencing, this report is organized in the same way as the subitems appear on the Council's docket.

DISCUSSION

Subitem A (R-2002-173) (Resolution Approving Pilot Pre-qualification Program)

If this resolution is adopted, it will authorize the Manager to implement a one-year pilot pre-qualification program, as described on pages six through eight of City Manager's Report No. 02-169 issued on July 24, 2002.

The City Attorney has previously stated that the pre-qualification program, as currently proposed by the City Manager, complies with existing case law and statutory requirements. The City Attorney issued a report to the Mayor and City Council, dated October 1, 2001, setting forth his analysis of the City Manager's proposed pre-qualification program. In summary, the report states the legal requirements for any pre-qualification program are as follows:

1. The agency must adopt and apply a uniform system of rating bidders using objective criteria.
2. The agency must establish an appeals procedure that will allow bidders to dispute their proposed pre-qualification rating prior to closing time for receipt of bids. The appeal process must include notice of the basis for the prospective bidder's disqualification and any supporting evidence that has been received from others or adduced as a result of any investigation by a public agency. In addition, the appeal process must provide an opportunity for the prospective bidder to rebut evidence or present contradictory evidence.

The City Manager's proposed pre-qualification program satisfies the above requirements in that the evaluation of bidders is based upon a standardized questionnaire and a pass/fail rating system developed by the State Department of Industrial Relations after extensive review by representatives of the contracting community - without legal challenge. Bidders that do not successfully pre-qualify will be given proper notice and an opportunity to appeal their pre-qualification rating, pursuant to the proposed revisions to Council Policy 000-29 (See SubitemC).

Subitem B (O-2002-132) (Debarment Ordinance)

This ordinance amends existing provisions of Division 8, Article 2, Chapter 2, of the San Diego Municipal Code [SDMC] governing debarment of contractors. These proposed amendments arose because of the City's experience in two debarment matters in the last two years. Subsequently, both the City Manager and City Attorney's staff involved in the debarment hearings recommended clarification and supplementation of the City's debarment laws and procedures.

These proposed amendments substantially reorganize and rewrite existing provisions. They are largely modeled after existing federal debarment regulations located in Part 9.4 of Title 48 of the Code of Federal Regulations. Case law and administrative decisions interpreting substantially similar federal provisions will help in interpreting the City's laws in future debarment matters.

The major changes proposed by this ordinance are as follows: It adds several definitions to the current debarment provisions and expands and clarifies some existing definitions. The ordinance also provides for the establishment of a fair and impartial three-member debarment hearing board to hear debarment matters and to make debarment decisions for the City. It sets rules regarding who may serve on a hearing board. It requires debarment hearing boards to follow procedures set forth in the Municipal Code and it provides procedures for delivery of required notices. It further requires debarment hearing boards to make decisions based on evidence presented at an informal hearing. It sets the standard of proof before a debarment hearings board.

It states the circumstances under which a debarment hearing board has authority to debar a person or corporation and states that a debarment hearing board's decision is final.

The ordinance also allows the City Manager to suspend a person or corporation from being able to contract with the City pending debarment under certain circumstances. It also specifies that debarment may be imposed permanently or for one or three years depending on the grounds for debarment. Under existing law, debarment may be imposed either permanently or for three years, but not for one year.

It expands and clarifies the grounds for debarment. Specifically, among other existing grounds for debarment, it adds that a person or corporation's failure to implement its Equal Employment Opportunity Plan required by SDMC section 22.2705 constitutes grounds for debarment. It also states that a person or corporation's practice of unlawful discrimination in employment and failure to take proper corrective action following notice by the City constitutes grounds for debarment. It further adds that the City's issuance of one or more unsatisfactory performance evaluations to a contractor is grounds for debarment. It also states that submitting a false statement of gross income under the City's Minor Public Works Construction Project program (see related Subitem E) is grounds for debarment.

The proposed ordinance provides for appeals to the City Council from decisions of a debarment hearing board under certain circumstances and provides for the submission of argument on appeal. It also provides for judicial review of the City's debarment decisions. It states the effect of another governmental agency's debarment on a person's ability to enter contracts with this City. It also provides that a debarred person is liable to the City for the City's increased costs resulting from having to replace that debarred person. Finally, it states that the City has the authority to enter into agreements with persons in which they agree not to bid on City contracts for a period of one year in lieu of a debarment hearing and states that these agreements do not themselves constitute debarments.

Subitem C (R-2002-32) (Resolution Approving Bid Protest Policy)

This is a companion resolution to the resolution of Subitem A. The resolution in Subitem C authorizes changes to Council Policy 000-29.

The proposed changes provide notice and hearing procedures for the City's designation of a bidder as non-responsible. In *City of Inglewood-L.A. County Civic Center Auth. v. Superior Court*, the California Supreme Court held that a public body must, prior to awarding the contract to other than the lowest bidder, notify the low monetary bidder of any evidence reflecting on responsibility, afford that bidder an opportunity to rebut such evidence, and permit the bidder to present evidence that he or she is qualified to perform the contract. The existing policy does not specifically reference the notice and hearing procedure for the City's designation of a bidder as

“non-responsible.” The proposed revisions include a specific section for providing notice and a hearing to bidders designated by the City as “non-responsible.”

The proposed changes define terms used in the Policy, among which the terms “responsible” and “responsiveness” are most significant. The due process requirements for a bidder that has been designated as “non-responsible” are stricter than that for a bidder that has been deemed “non-responsive.” Therefore, the proposed revisions to the policy distinguish the two terms and provide a different protest procedure for each, depending upon the bidder’s designation. In short, a bidder that is deemed “non-responsible” will be afforded a protest hearing while a bidder designated as “non-responsive” will not be afforded a hearing, but may protest in writing. The reason for this distinction is that a bidder’s responsiveness can generally be determined from the face of the bid documents while a bidder’s “responsibility” generally results from a weighing of factors that are more subjective and not necessarily apparent from the face of the bid.

The proposed changes streamline current hearing procedures. The existing Policy provides for a bid protest hearing before City Council for purchasing contracts exceeding \$1,000,000 and for public works contracts that require City Council confirmation. The proposed changes to the Policy would provide for a hearing before a protest board only. The changes are being proposed to conform the Policy to existing practices.

Subitem D (O-2002-28) (Bid Protest Ordinance)

This is a companion ordinance to the resolutions of Subitem A and Subitem C. This ordinance amends the City’s public contracting provisions in Chapter 2, Article 2, Division 30 of the San Diego Municipal Code pertaining to bid protests and makes the following changes to the Municipal Code:

The proposed ordinance defines “responsibility” and “responsiveness” and provides a hearing procedure for designations of “non-responsibility” and a written protest procedure for designations of “non-responsiveness.”

It also provides a notice procedure for the City’s designation of a bidder as “non-responsible,” specifies the proper grounds for a hearing, which are not in the existing ordinance, and clarifies the time limitations for request of a hearing..

Subitem E (O-2002-27) (Minor Construction Contract Ordinance)

This is an ordinance amending Chapter 2, Article 2, of the Municipal Code pertaining to the City's public contracting. This ordinance implements the Minor Construction Contract Program described on pages eight through ten of City Manager's Report No. 02-169. Authority for this ordinance is located in Charter section 94, which reads in relevant part:

In the construction, reconstruction or repair of public buildings, streets, utilities and other public works, *when the expenditure therefor shall exceed the sum established by ordinance of the City Council*, the same shall be done by written contract, except as otherwise provided in the Charter, and the Council . . . shall let the same to the lowest responsible and reliable bidder, not less than ten days after advertising for one day in the official newspaper of the City for sealed proposals for the work contemplated. [Emphasis added.]

Specifically, this ordinance establishes a new Division 36 in Chapter 2, Article 2, of the Municipal Code titled "Bidding and Award Requirements for Minor Public Works Contracts" and creates alternative advertising, bidding, and award procedures for public works contracts for which the City's expenditure is \$250,000 or less. It makes the following changes to the Municipal Code:

It states the purpose of the division and describes its applicability. It provides definitions of the terms "emerging business" and "small business" and provides a mechanism for determining the value of a public works contract for purposes of this Division.

The ordinance requires the City Manager to establish and maintain minor public works contract availability lists and states the criteria the Manager must use to make the determination for placement on the availability lists. It also provides for an application process. It sets forth the criteria to be used to determine whether a particular small or emerging business will be considered eligible for placement on the City's availability lists for participating in the program. It provides for the removal of a small or emerging business from the availability lists under certain circumstances and allows for reinstatement of that business upon re-application if the business meets the eligibility criteria.

It provides a procedure for competitive bidding and award of minor public works contracts valued at \$50,000 to \$250,000 to small or emerging businesses listed on the City's availability lists. It provides a different procedure for bidding and award of minor public works contracts valued at under \$50,000.

The ordinance makes several other additions to Division 36 to implement the program, namely: it requires names of businesses on the City's availability lists to be rotated to ensure

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fairness in contracting; it states that plans and specifications will be provided free of charge to small or emerging businesses; it provides alternative bidding and award procedures for emergency minor public works contracts; it describes the effect of later amendments to a public works contract that changes its value; and, it requires the City Manager to adopt regulations to implement the program.

It makes housekeeping amendments to Divisions 30, 31, 32, and 35 of Chapter 2, Article 2 of the Municipal Code made necessary by creation of this program. Significantly, it adds definitions of the terms “award,” “award date,” or “date of award,” “emergency,” “major public works contract,” “minor public works contract,” and “valued at.”

It makes other housekeeping amendments to Chapter 2, Article 2, of the Municipal Code, including sections governing bid initiation and advertising of major public works contracts; bond and insurance requirements for City contracts; issuance of specifications for contracts requiring bidding; invitations to bid; major public works contracts that may be awarded by the City Manager; and, contracts that are required to be competitively awarded.

Subitem F (R-2002-172) (Resolution Approving Exemption from SCOPe Program)

This is a proposed resolution that, if adopted, will exempt contracts valued at \$250,000 or less from review under the Subcontractors Outreach Program (SCOPe), as described on page ten of City Manager’s Report No. 02-169.

CONCLUSION

Subitems A, C, and D are two resolutions and one ordinance amending the Municipal Code. They are all companion items pertaining to the City’s program to pre-qualify contractors who seek to do business with this City as “responsible” and the City’s bid protest procedures for designation of a contractor as “non-responsible. Subitem B is an ordinance proposing clarification and supplementation of the City’s existing debarment laws and procedures contained in the Municipal Code. Subitem E is an ordinance amending the Municipal Code and implementing the City’s proposed Minor Public Works Contract Program. Subitem F is a resolution exempting contracts under \$250,000 from review under the Subcontractor Outreach Program (SCOPe).

Respectfully submitted,

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CASEY GWINN
City Attorney

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cc: City Manager
RC-2002-13